

UNITED STATES DISTRICT COURT OF THE  
DISTRICT OF COLUMBIA

FILED

JAN 9 2013

Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

Adrian Edwardo Pena #48597-280  
Plaintiff F.P.C. P.O. Box 5000  
Florence, CO 81226  
vs.

Eric Holder, Attorney General  
United States Department of  
Justice  
and  
Robert S. Mueller, Director  
United States Federal Bureau  
of Investigation  
and  
United States of America  
  
Defendants

Case: 1:13-cv-00031  
Assigned To : Leon, Richard J  
Assign. Date : 1/9/2013  
Description: FOIA/Privacy Act

COMPLAINT

**Nature of Action**

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., for injunctive and other appropriate relief, and seek the expedited processing and release of agency records requested by Plaintiff from Defendant/s.

**Jurisdiction and Venue**

2. This Court has subject matter jurisdiction of Freedom of Information Act suits under the Act itself, 5 U.S.C. § 552 (a)(4)(B).
3. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 701 et seq.
4. Venue lies in this district under 5 U.S.C. § 552 (a)(4)(B).

**Parties**

5. Plaintiff is a prisoner, who has been Federally convicted and sentenced in a United States Federal District Court, and is currently under appeal for his convictions in the Fifth Circuit Court of Appeals.
6. Plaintiff is currently serving his sentence at the Florence, Colorado, Federal Prison Camp.
7. Defendant Eric Holder, Attorney General, agency head of the United States Department of Justice, and Defendant, Robert Mueller, Director of the United States

Federal Bureau of Investigation, are responsible for the enforcement and compliance with the laws and regulations of the United States, including the laws and regulations at issue in this case.

8. These defendants and/or their predecessors and successors, acting in their official capacity are responsible. The relief requested here is not confined to Defendant's personally, but extends to and includes all of the employees, officers, attorneys and agents of the United States Department of Justice, Federal Bureau of Investigation.

9. The Department of Justice is a department of the Executive Branch, by FOIA under 5 U.S.C. (f)(1).

10. The Federal Bureau of Investigation is a component of the Department of Justice. The Federal Bureau of Investigation is an agency within the meaning of 5 U.S.C. 552 (f).

### **Plaintiff's FOIA Request**

11. On or about October 26, 2008, Plaintiff was unexpectedly approached and interrogated by Federal Bureau of Investigation ("FBI") Special Agent Julio Cordero and along-side with Office of Inspector General ("OIG") Agent Eric Benn, both of El Paso Texas, while Plaintiff was walking outside of a pizza parlor. Plaintiff surreptitiously taped the agents using a recording device. ("The Recording")

12. By means of a letter to Defendant, FBI, executed on October 2, 2011, Plaintiff made specific request for disclosure under the FOIA. The specific records sought, was the compiled file/records of The Recording. A true and correct copy of the recording is attached to this complaint and incorporated by reference as Exhibit 1.

13. The FOIA letter specifically requested and sought "(1) any and all information associated with this recording (see exhibit attached) (2) any and all investigations related to the recording attached, their outcome of the investigation if their were any (3) any and all investigation and/or investigatory reports related to the recording (4) reports or evidentiary and/or scientific information, findings related to the recording (5) any and all correspondence related to the recording (6) any final and closing investigation reports," among other request made. The Plaintiff was specific in requesting records derived from the recording, and the recording alone. A true and correct copy of the FOIA Request is attached to this complaint and incorporated as Exhibit 2.

14. On or about November 29, 2011, Sandra A. Bungo, Unit Chief, of the Initial Processing Unit, of the FBI, acting in her official capacity, made her final

decision that **the recording**, and claims surrounding the recording had been reviewed, "no further action is warranted regarding this issue", and the matter surrounding the recording we consider this matter closed. A true and correct copy of the FBI's final decision of a closed matter is attached to this complaint and incorporated as Exhibit 3.

15. On February 14, 2012, Mr. David M. Hardy, Section Chief Record/Information Dissemination Section, Records Management Division of the FBI, acting in his official capacity claimed the records sought in Plaintiff's FOIA request are "located in an investigation file which is exempt from disclosure pursuant to 5 U.S.C. § 552 (b)(7)(A), (b)(7)(F)." Mr Hardy alleges "that there is a pending or prospective law enforcement proceeding relevant to these responsive records; and that the release of the information contained in these responsive records could reasonably be expected to endanger the life or physical safety of any individual, or interfere with the enforcement proceeding." A true and correct copy of the FBI's claimed exemption letter is attached to this complaint and incorporated as Exhibit 4.

16. Plaintiff filed for appeal. In a letter dated April 25, 2012, the Office of Information Policy ("OIP") assigned an appeal reference number to the FOIA request for appeal. The letter further advised future correspondence regarding this matter should mention the assigned number AP-2012-01977.

17. On May 1, 2012, Plaintiff sent correspondence supporting matters for OIP to consider, specifically items A-J. The letter appropriately referenced the assigned appeal number. A true and correct copy of the letter containing request A-J is attached to this complaint and incorporated as Exhibit 5.

18. On July 17, 2012, the OIP purportedly denied the appeal on the same grounds as Mr. Hardy's letter detailed. This denial letter advised that the denial was final, leaving judicial review in accordance with 5 U.S.C. § (a)(4)(B).

#### **Claims for Relief**

19. Plaintiff repeats and realleges paragraphs 1 through 18.

20. Defendants have wrongfully withheld the requested records from Plaintiff.

21. Defendants have failed to make an adequate search for responsive records.

22. Defendants have failed to set forth the search terms used and the search conducted, as well as describe the structure of the file system searched, for the records sought.

23. Defendants have failed to provide a declaration providing the Date of a document withheld, the number of documents withheld, and the nature or type of material

and information withheld.

24. Defendants have failed to provide reasonable segregable, nonexempt portions of the requested record.

25. Defendants have failed to justify its withholdings, document-by-document or category-of-document by category-of-document, and further detail how the release of each document or category would interfere with a law enforcement proceeding, or investigation in a palpable, particular way.

26. Defendants have failed to produce the requested affidavits, made by Plaintiff, to support<sup>5</sup> their exemptions applied and assert the record cannot be further segregated.

27. Defendants have failed to produce or support a nexus directly relevant to the records sought and any law enforcement action related to legal proceeding case numbers, active or closed.

28. Defendants, on reliance of Exemption 7(F), have failed to explain the nexus between disclosure and attributable harm, to support<sup>6</sup> how disclosure of the Entire Record, "In Full", or Segregated, could reasonably be expected to "endanger" the life or safety of any individual.

29. Defendants have failed to produce or attempt to produce narrowly redacted portions of the record, a common practice exercised by Governmental Agencies in attempting to demonstrate "Good Faith".

30. Since the initiation of this FOIA request, Defendants have not released a single document or provided any information from the record, a showing of "Bad Faith".

31. Plaintiff additionally claims the information withheld under the alleged exemptions is controverted by contrary evidence in the record.

32. The information/records sought by Plaintiff are not exempt from disclosure under the FOIA and is not exempt on the grounds cited by Defendants, because the information sought was:

- a. Made by Plaintiff;
- b. Purposely forwarded to a cooperating witness working with the FBI, Raul R. Solis, for the purpose of providing the recording to the FBI;
- c. The Cooperating witness, Raul R. Solis, is a known "Cooperating Witness" according to official public records filed in the USDC;
- d. The FBI was provided a copy of Plaintiff's recording;
- e. The recording has never been admitted into discovery in any legal proceeding, related to Plaintiff, of any other Legal Proceeding;
- f. The FBI and the OIG played the recording to Plaintiff;
- g. and finally, all records sought were derived by Plaintiffs efforts behind

the recording, conducted by Plaintiff himself.

33. The information sought by Plaintiff cannot be retrieved unless this Court grants the relief requested and compels disclosure, the Plaintiff has no other remedy at law or otherwise.

34. Defendant's failure to grant Plaintiff's request, by withholding the information is arbitrary, capricious, and an abuse of discretion, not in accordance with law and without observance of procedure required by law.

35. Under the Freedom Of Information Act, the Plaintiff is entitled to an injunctive order compelling the Defendants to disclose the information sought by Plaintiff, "In Full".

36. Plaintiff further seeks judgment against Defendant for any reasonable fees, and its cost of litigation, which it has and will reasonably incur in the case.

### Prayer

Plaintiff ~~Pays~~<sup>Prays</sup> that this Court:

- A. Grant Plaintiff permission to proceed in forma pauperis, pursuant to 28 U.S.C 1915 (Application filed separate from Complaint);
- B. Appoint Plaintiff counsel, if this Court deems it appropriate;
- C. Order Defendants immediately to process the requested records in their entirety;
- D. Order Defendants, on completion of expedited processing, to disclose the requested records in their entireties and make copies available to Plaintiff;
- E. Provide for expeditious proceedings in this action;
- F. Award Plaintiff cost of reasonable attorney's fees (if incurred) and cost of litigation reasonably incurred by Plaintiff in this case;
- G. Grant Plaintiff all other relief that is just and proper.

DATED: 12/17/2012

By: 

Adrian Edwards Pena  
# 48597-280

F.P.C. P.O. Box 5000  
Florence, CO 81226-5000  
(719) 784-9464 - Camp Telephone